

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2008-051232

05/08/2012

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

IN RE THE MATTER OF
SAM J SWALLOW

SAM J SWALLOW
NO ADDRESS ON RECORD

AND

JASMINE SHEA EDWARDS

JASMINE SHEA EDWARDS
20638 E PARK VIEW LN
MAYER AZ 86333

JENNA L SWALLOW

ROBERT D ROSANELLI

MARK J THEUT

UNDER ADVISEMENT RULING

Pending before the Court is Intervenor's (Jenna L. Swallow's) Petition for *In Loco Parentis Custody*, filed April 22, 2011.¹ The Intervenor, Jenna L. Swallow, is the wife of Petitioner/Father and she is the Stepmother to the minor child "S" (DOB 7/17/2001). Father passed away on or about April 21, 2011, at which time Mother and Father were sharing joint legal custody. Pursuant to the parties' informal agreement, Father was acting as the primary residential custodian. Mother had moved to Mayer, Arizona, rendering the formal parenting time orders logistically problematic. Even under the parties' informal agreement, Mother had not been regularly exercising parenting time.

One day following Father's passing, the Court granted Intervenor's Motion for Temporary Orders without notice. On an emergency basis, the Court ordered that Intervenor shall stand temporarily in *loco parentis* with S, having temporary sole legal/physical custody. Mother was awarded parenting time Wednesday-Friday and Saturday afternoons.

¹ The Mother and Father's decree of dissolution was entered on August 19, 2008. Mother was designated the primary residential custodian but Father had almost 50% parenting time. See Decree (8/19/08).

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On May 9, 2011, the Court held a contested emergency hearing. The Court ordered:

- Mother shall be the primary residential custodian beginning the end of S's academic school year.
- Intervenor stands in *loco parentis* pending trial.
- Mother was not to permit contact, direct or indirect, with the father of her other children, "Chris." The restriction was based : (1) on *Mother's* previous allegations that Chris posed a domestic violence risk (she obtained an order of protection in December of 2010); and (2) S was afraid of Chris.

On October 7, 2011, the Court ordered the appointment of a Best Interest Attorney (BIA), pursuant to Rule 10 of the Arizona Rules of Family Law Procedure. The Court also ordered both parties to undergo a one-time drug test--- which was negative.²

On December 5, 2011, the BIA filed a Request for Emergency Telephonic Conference. On December 9, 2011, the BIA filed a written motion asking that Mother have supervised contact only. The BIA reported that he had good cause to believe that S was the subject of Mother's abusive conduct, and, in any event, S had been in direct contact with Chris.

At the emergency telephonic conferences that followed, Mother admitted that Chris had been having contact with S. She denied any abusive conduct--- and, as she admitted later, she lied to the Court about her whereabouts during the telephonic conference *because* she and S were with Chris at that time.

The Court immediately ordered a change in physical custody, providing that Intervenor would be the primary residential custodian. The Court provided Mother with supervised parenting time--- an opportunity that Mother availed herself of just once prior to the evidentiary hearing held four months later.

The Court held trial on April 10, 2012 and April 23, 2012. The Court took the matter under advisement and now rules.

² Both Father and Mother have had past prescription drug problems. Father died of an overdose and Chris affirmatively called law enforcement and advised that mother had "serious drug problems" in May 2010.

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Intervenor has alleged that Mother failed to give S his medication during the summer of 2011. Intervenor's belief was based on the lack of prescription pick-up activity. Mother offered a puzzling and frankly unbelievable explanation. She testified that the lack of pharmacy records demonstrating her pick-up of prescriptions was due to her having saved the medications in the past, even during time periods when she did not have regular visitation. In other words, she alleges that she picked up and saved prescriptions during time periods when she had no parenting time with S.

Mother's explanation is bizarre and not credible. Mother had already demonstrated a willingness to tell Court an untruth, and the Court finds her credibility lacking on this important point.⁴

Ultimately, the Court is left in a position of assessing whether it would be significantly detrimental to place S with Mother in light of: (i) Mother's patent dishonesty with the Court; (ii) Mother's willful failure to abide by Court orders designed to protect S; and (iii) Mother's failure to provide S with his medication. These circumstances inure to a finding that Intervenor has met her burden to demonstrate--- by clear and convincing evidence--- that S's placement with Mother would be significantly detrimental to S, and the Court expressly makes this finding.

3. Have custody orders been entered in the last year?

No.

4. Were the child's legal parents married at the time the Petition was filed?

No.

The Court also turns to the factors set forth in Ariz. Rev. Stat. Ann. § 25-403(A) (2011) in order to determine what is in S's best interests--- recognizing that Intervenor faces a heavy burden to prove otherwise. The Court considers the totality of the circumstances and considers the applicable factors. *Cf. Jordan v. Rea*, 212 P.3d 919 (Ariz. Ct. App. 2009) (directing that when best interests of a child are at issue, the Courts should look to

choice to disregard the no-contact order. Her relationship with Chris, standing in isolation, does not provide the Court with a basis to find that placement of S with her would be seriously detrimental.

⁴ The Court rejects allegations that Mother physically abused S during his 2011 stay with Mother.

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Title 25-403 for guidance). The Court considers these factors in light of Intervenor's burden to rebut the presumption that it is in S's best interest to remain with Mother by clear and convincing evidence.

1. The wishes of the child's Parent and Intervenor as to custody.

- § Mother wishes to have sole legal custody.
- § Intervenor wishes to be S's custodian.
- § Both parties agree that on-going contact between S and other party is in S's best interest.

2. The wishes of the child as to the custodian.

- § S is just 10 years old.
- § Without a doubt, he wishes to remain with Intervenor.

3. The interaction and interrelationship of the child with the Intervenor, Mother, the child's siblings and any other person who may significantly affect the child's best interest.

- § Mother loves S very much and S loves Mother.
- § Intervenor loves S very much and S loves Intervenor.
- § S feels somewhat estranged from Mother.
- § S's views about this adversarial litigation approaches a "winner take all" character. Having chosen his side (he sides with Intervenor), S's conduct with Mother has included baiting and challenging Mother's parental authority.
- § S's contact with Mother, over the last year, has been sporadic. Between May 2011 and December 2011, Mother and S had frequent contact and they interacted sufficiently well.
- § Also living in Mother's home are: S's step-grandmother, S's half-aunt and his half-siblings Jackson (17 months old) and Dexter (an infant). S interacts sufficiently well with these individuals.
- § There is no evidence that Chris poses a danger to S when Mother and Chris are engaged in a harmonious relationship; Chris effectively lives with Mother. Chris is Jackson's and Dexter's biological father.
- § Intervenor and Father had an infant son together.

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4. The child's adjustment to home, school and community.

- § S has adjusted very well to living with Intervenor.
- § While Intervenor disputed S's school adjustment under Mother's care, the Court finds Mother's testimony on the subject to be supported by the evidence, that his poor grades were interim in nature and would not have reflected his final grades.
- § As noted above, S has been combative with Mother largely due to this litigation which has made his adjustment to Mother's home challenging.
- § S has academically done sufficiently well and he has emotionally flourished under Intervenor's care.

5. The mental and physical health of all individuals involved.

- § S has hearing loss and suffers from oto-facial-cervical syndrome which affects his kidneys and hearing. He also has some physical malformations, like sloped shoulders and a small palate. He wears hearing aids that he received from Rehabilitation Services.
- § Both Intervenor and Mother know how to care for his medical needs effectively. Mother, however, has not been committed to seeing that S gets the prescription medication that he needs on a regular basis.

6. Whether Mother or Intervenor is more likely to allow the child frequent and meaningful continuing contact with the other. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.

- § Both parties recognize S's emotional need to stay connected to the parties, regardless of the outcome of this litigation.
- § The Court finds that neither party is more or less likely to allow S frequent and meaningful contact with the other.

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7. Whether Mother or Intervenor, or neither, have provided primary care of the child.

§ Since the parties' divorce in 2008, Intervenor (and Father) has provided more day-to-day care for S, at least since Mother moved to Mayer.

§ Both parties are fully capable of tending to S's needs.

8. Whether a parent has complied with Chapter 3, article 5 of this Title 25, taking the Parenting Information Program ("PIP") class.

§ On June 10, 2008, Mother filed her certificate of attendance reflecting that she has taken the PIP class.

§ Because custody orders have not been entered as between these parties, the Court finds that Intervenor has not failed to comply with PIP requirements.

9. Whether Mother or the Intervenor were convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.

§ There is no evidence that either parent has been convicted of this criminal offense.

§ There is no evidence that the Intervenor has been convicted of this criminal offense.

10. Whether there has been domestic violence or child abuse as defined in section 25-403.03:

§ There is no credible evidence that either party has engaged in child abuse or domestic violence.

Based on the totality of the circumstances, the Court finds that Intervenor has met the burden of proof imposed by Ariz. Rev. Stat. Ann. § 25-415. She has rebutted the presumption that awarding custody to Mother would be in S's best interest.

In May 2011, this Court made clear that it found Chris to pose a risk to S. Mother believed otherwise and violated this Court's direct orders. She placed her relationship with Chris above court orders specifically tailored to protect S.

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- Mother shall be entitled to parenting time on Thanksgiving Day from 8:00 a.m. to 4:00 p.m. in odd-numbered years and from 4:00 p.m. to the following day (Friday) at 10:00 a.m. in even-numbered years.
- Mother shall be entitled spend Christmas parenting time with S during Time Period One in even-numbered years and Time Period Two in odd-numbered years, which are defined as follows: Time Period One: December 23rd after school (or 8:00 a.m. if school is not in session) until December 24th at 10:00 p.m.; and Time Period Two: December 25th at 10:00 p.m. until December 27th at 8:00 a.m.

IT IS FURTHER ORDERED that should either party wish to remove the child from Maricopa County when the child is in her custody, she must inform the other party by e-mail----within 7 days and provide an itinerary that provides contact information for S during the time period she will be away.

Modification of These Orders

IT IS FURTHER ORDERED that Intervenor and Mother may mutually agree to temporarily modify these Court orders, in writing. Any agreements to permanently modify the orders must be provided to the Court, in writing, as a written stipulation.

IT IS FURTHER ORDERED that prior to filing any Petitions under Rule 91 of the Arizona Rules of Family Law Procedure, the parties shall use this Court's Conciliation Services in an attempt to mediate the proposed change. Mother or Intervenor may seek modification of these orders without mediation if emergency circumstances exist.

IT IS FUTHER ORDERED that the parties shall bear their own attorneys' fees and costs.

IT IS FURTHER ORDERED relieving Mr. Theut from his appointment as Best Interests Attorney in this case.

FILED: Exhibit Worksheet

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

/s/ Michael D. Gordon

MICHAEL D. GORDON

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JUDGE OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes.
A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.